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No. 95-1164

In The

Supreme Court of the United States

October Term, 1995

CORRECTED COPY

M. J. "MIKE" FOSTER, JR., In His Official Capacity as Governor of the State of Louisiana; RICHARD P. IEYOUB, In His Official Capacity as Attorney General of the State of Louisiana; and BOBBY P. JINDAL, In His Official Capacity as Secretary of the Louisiana Department of Health and Hospitals

Petitioners

v.

HOPE MEDICAL GROUP FOR WOMEN, On Behalf of Itself and the Medicaid-eligible Women of the State of Louisiana To Whom It Provides Health Care; IFEANYI CHARLES OKPALOBI, M.D., On Behalf of Himself and His Medicaid-eligible Patients Seeking Abortions; and ZORA H. (a Pseudonym), On Behalf of Herself

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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Petitioners' Reply Brief

Petitioners for Writ of Certiorari in this case—the Honorable M.J. "Mike" Foster, Jr., Governor of the State of Louisiana; the Honorable Richard P. Ieyoub, Attorney General of the State of Louisiana; and Bobby P. Jindal, Secretary of the Louisiana Department of Health and Hospitals—submit the following reply to Respondents' Brief in Opposition:

1. *Fallacious Reasoning*. Petitioners object to Respondents' proposed "Question Presented" and their overall ensuing counterstatement and argument in their Brief in Opposition as comprising, among other errors, well-known fallacies in logic which reveal Repondents' stated position to be made up of erroneous and invalid reasoning. Two of the types of fallacies into which it is submitted Respondents' overall presentation is constituted, have been explicated in pedagogy to be the "Complex Question" and the *"Petitio Principii"* (more commonly known as "begging the question").

a. *Logical Fallacy*. Irving M. Copi and Carl Cohen, in their widely used textbook, *Introduction to Logic*, 8th ed. (New York: Macmillan Publishing Company, 1990), explain what a fallacy in logic is:

> "A fallacy is an error in reasoning. As logicians use the word it designates not any mistaken idea or false belief, but *typical* errors, mistakes that arise commonly in ordinary discourse, and that render unsound the arguments in which they appear."

Id., p. 91.

i. *The Complex Question Fallacy*. Copi and Cohen further explain that the "Complex Question" fallacy is one of the most common and consists of

"asking a question in such a way as to presuppose the truth of some conclusion buried in that question. The question itself is likely to be rhetorical, no answer genuinely sought. But putting the question seriously, and taking it seriously, often achieve the questioner's purpose, fallaciously....

"The danger that complex questions present, especially when they are put before a legislative (or other decision-making) body, has resulted in giving privileged position, in parliamentary procedure, to the motion to *divide the question*....

"Fallacious complexity can appear in discourse of different forms.... More commonly, ...the fallacy takes a less explicit and trickier form, in which a single speaker, or writer, deliberately poses the complex question, answers it himself, and then goes on to draw the fallacious inference."

Id., pp. 96-97.

ii. *The Petitio Principii Fallacy*. As to the "*Petitio Principii*" (or "Begging the Question") fallacy, Copi and Cohen teach:

"To beg the question is to assume the truth of what one seeks to prove, in the effort to prove it. That would seem to be a silly mistake, evident to all—but how silly or obvious the mistake is depends largely on the way in which the premisses of the argument are formulated. Their wording often obscures the fact that buried within one of the premisses assumed lies the conclusion itself....

"Those who fall into this error often do not realize that they have assumed what they set out to prove. The fact of that assumption can be obscured by confusing and therefore unrecognized synonyms, or by a chain of intervening argument. Every *petitio* is a *circular argu-*

ment, but the circle that has been constructed may—if it is large or fuzzy—go quite undetected.

"Powerful minds are sometimes snared by this fallacy...."

Id., p. 102

b. *Respondents' Complex Question Fallacy.* It is submitted that Respondents' proposed "Question Presented" in their Brief in Opposition is such a "Complex Question" which hides and attempts to avoid altogether an honest, forthright deliberation of the proper "Question Presented" in this case as set forth by Petitioners in their Petition for Writ of Certiorari. It does so by presupposing an answer in Respondents' favor to such hidden question without an open and forthright consideration, analysis, or meaningful opportunity to brief, argue, and seek a pointed adjudication of that question. If it is first determined from all the proper and contemporaneous interpetative indicators that Congress, in enacting the provisions of Title XIX, did not intend *mandatory* state coverage of abortions performed for any reason other than to save the life of the mother, the other parts of Respondents' proposed "Question Presented" (*and all their arguments related thereto*)–such as whether federal funding is subsequently made available therefor (to those states which have *optionally* chosen under Title XIX to cover such abortions) or whether some reasons given for the performance of abortions (other than to save the life of the mother) might make them, in the personal opinion of some providers, "medically necessary" as that qualifying term of art may or may not be used in Title XIX statutory provisions or administrative regulatory policies and guidelines—then become entirely academic, hypothetical, and meaningless.

As Copi and Cohen have explained regarding the Complex Question fallacy, *supra*, Respondents' proposed "Question Presented" in opposition *must be divided*. Indeed, while almost all of the other appellate court circuits cited by

Respondents' in their opposition appear to have fallen into this fallacious trap, the U.S. Court of Appeals for the Fifth Circuit below in this case *actually did divide the question* in the very decision and opinion review of which is sought herein. *See* Pet., pp. 8-9, and Pet. App. "A," pp. 1a-21a.[1] Thus, the U.S. Court of Appeals for the Fifth Circuit did not really affirm the district court's decision "in all respects," Opp., p. 3, as reported in Respondents' "Counterstatement of the Case." *Cf.* Pet., pp. 8-9; Pet. App. "B," pp. 25a-26a, 29a-30a; Pet. App. "A," pp. 7a-11a. Rather, the U.S. Court of Appeals for the Fifth Circuit itself *isolated* the question which is sought to be reviewed by Petitioners herein and which, accordingly, is set forth by Petitioners as the "Question Presented" in their Petition for Writ of Certiorari. *Cf.* Pet., p. i; Pet., pp. 8-9; Pet. App. "A," p. 11a. Petitioners' "Question Presented" as set forth in their Petition for Writ of Certiorari is, thus, the proper question presented for review in these proceedings. Moreover, the isolation of this, the real question to be answered in this entire *genre* of cases makes this case, unlike the others which have come before this Honorable Court, uniquely appropriate for review.

c. *Respondents' Petitio Principii Fallacy.* A strain of the *Petitio Principii* Fallacy of "Begging the Question" runs subtly throughout Respondents' opposition. But it is most visible in their argument that this Honorable Court should not review a statutory interpretation on which the outcome of the case directly depends, even when it very well might be an erroneous interpretation contrary to Congressional intent, merely because the same ultimate result was obtained by other circuits in other cases in which the specific grounds for such reasonable cause

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[1] Citations to the Petition for Writ of Certiorari are in the form "Pet., p.——"; citations to the Appendix to the Petition for Writ of Certiorari are in the form "Pet. App. '——,' p. —— a"; citations to Respondents' Brief in Opposition are in the form "Opp., p. ——"; citations to the Appendix to Respondents' Brief in Opposition are in the form "Opp., p. A-——."

were never discussed or disposed of (and, therefore, apparently never argued). This Honorable Court should not be persuaded that it should reject review of one particularly unique *ratio decidendi* raising the proper question together with reasonable grounds for asserting it is a statutory misinterpretation contrary to Congressional intent, on the mere grounds that there exists a pattern of similar final outcomes resulting from a variety of misinterpretations of different enactments in separate cases in different circuits. Nor can the quantitative repetition of an error serve as the proper qualitative authority for the alleged truth and validity of the error continuing to be replicated. This Honorable Court has yet to ascertain the true, original Congressional intent in the enactment of the Title XIX provisions regarding mandatory state coverage of abortions performed for any reason other than to save the life of the mother—the question uniquely isolated and presented in this case—and it is submitted that the ultimate and definitive interpretation of Congressional statutes to determine the outcome of cases and controversies is one of *the* functions for which this supreme court of the land, overseeing the myriad of lower, statutorily-created courts, was constitutionally created. This Honorable Court should fulfill that function by ascertaining and giving effect in this case to the true Congressional intent underlying the enactment of Title XIX provisions.

Indeed, all the circuit cases cited and relied upon by Respondents in opposition appear to be entirely devoid of any explanation why, for example, "[abortion] clinic services furnished by or under the direction of a physician, without regard to whether the clinic itself is administered by a physician," 42 U.S.C. §1396d(a)(9) (Pet. App. "I-2," p. 117a) must fall under some broadly overstated category of mandatory services, to which these particular services are ill-fitted and poorly matched, rather than the category of optional services described by 42 U.S.C. §1396d(a)(9), to which they are precisely

tailored and accurately matched in description. Nor do they even attempt to explain why an abortion performed as a

> "preventative...service[]...recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical [and] mental disability and restoration of an individual to the best possible functional level,"

42 U.S.C. §1396d(a)(13), on a woman to remove residual reminders of rape or incest, necessarily falls under some broadly overstated category of mandatory services, to which this particular service is ill-fitted and poorly matched, rather than the category of optional services described by 42 U.S.C. §1396d(a)(13), to which it is precisely tailored and accurately matched in description. (Pet., pp. 14-17; Pet. App. "I-2," pp. 116a-119a.) Nor do any of these cases appear to mention or discuss the contemporaneous circumstances at the time of the enactment of the Title XIX provisions, as this Honorable Court did and relied on in *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977), in an attempt to ascertain and give effect to the true Congressional intent underlying Title XIX. (Pet., pp. 17-19.) None of these cases appear to discuss the explanations given on the floor of Congress by the Congressional proponents of enacted amendments restricting Medicaid abortion funding, that such amendments were not in derogation of Title XIX but rather in implementation of the true meaning and Congressional intent underlying the substance of Title XIX—amendments made necessary to abate Title XIX misinterpretations by the courts contrary to true Congressional intent. (Pet., pp. 20-22.) Nor do these cases appear to consider or discuss the meaning and effect of Section 9 of P.L. 100-517, which prohibits the Secretary of Health and Human Services, as a matter of substantive law, from changing any administrative regula-

tions, policy statements, interpretations, or practices with respect to abortion services from those in effect on October 24, 1988, or the fact that 42 C.F.R. §§441.202 and 441.203, effecting state coverage of abortion services within the Medicaid program only for the medical necessity of saving the life of the mother, was in effect on that date. (Pet., pp. 23-26; Pet. App. "I-5," "I-6," "I-7," pp. 138a-139a.)[2] Nor do the cases from the other circuits, who have so concluded, adequately explain how a mere exception-to-a-prohibition in the "Hyde Amendment" restriction on an appropriation of funds can be properly converted by them into a positive mandate.

2. *Concessions Erroneously Foisted Upon Petitioners Because of Stipulation in Different, Older Case Under Other Circumstances.* Petitioners have never in this case conceded that any abortions performed for reasons other than to save the life of the mother fall within any of the categories of services which are listed in 42 U.S.C. §1396d(a) (Pet. App. "I-2," pp. 116a-119a) and are also designated by 42 U.S.C. §1396a(a)(10) (Pet. App. "I-1," pp. 46a-47a) to be mandatory items for state Medicaid plans. Contrary to Respondents' arguments, a stipulation executed in a different, older case—*viz., Emma G. et al. v. Edwards et al.*, 434 F.Supp. 1048, 1050 (USDC, E.D. La., 1977)—under other circumstances between a former Governor and former state officials, not including the Attorney General, and a set of plaintiffs completely different from those in this case does not bind the Petitioners in this case

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[2] It should also be noted that 42 U.S.C. §1396b(m)—particularly, but without restriction to, 42 U.S.C. §1396b(m)(1)(A)(i), (1)(B), (2)(A), and (2)(B)(i)(II)—reveals a Congressional intent that Health Maintenance Organizations (HMO's) must provide to its Medicaid recipient members all of the mandatory services required to be in state Medicaid plans. Thus, with the enactment of Section 9 of P.L. 100-517, even if it were thought to be primarily applicable to HMO's, Congress evinces a clear intent and understanding that states are not required by the substantive provisions of Title XIX to cover abortions services (other than to save the mother's life) as a mandatory service.

or give the Respondents in this case any right to seek enforcement of such stipulation. Certainly, the Attorney General of Louisiana, who was not a party to the stipulation, was never bound by it. Moreover, a stipulation cannot resolve a question of law, such as the proper interpretation and construction of Congressional enactments, nor substitute an erroneous Congressional intent for the true and correct Congressional intent. In addition, the particular stipulation in *Emma G.* was of mere fact current at the time but no longer effective after intervening "Hyde Amendments" and other legislation and ensuing policy changes and changes in the federally-approved state Medicaid plan; the stipulation merely stated that it was the then policy of the Louisiana Department of Health and Human Resources to make payment, under Title XIX of the Social Security Act, for medically necessary procedures performed by qualified Title XIX medical vendors and to recognize therapeutic abortions (not further explained or described) as medically necessary procedures for this purpose.

3. *The "Bauman Amendment."* Respondents in their Brief in Opposition fail to identify for this Honorable Court that the "state-option" proviso to which they refer (Opp., pp. 10-11 n.6) was the so-called "Bauman Amendment." They also fail to point out that the U.S. Court of Appeals for the Fifth Circuit in this case squarely rejected their same argument in this regard. (Pet. App. "A," pp. 8a, 10a-11a.) Indeed, Representative Bauman's own explanation of his amendment supports Petitioners' interpretation of Title XIX, not Respondents. *See*, for example, Pet., pp. 21-22.[3]

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[3] But if there were a need to explain why such an amendment would no longer be considered needed to accomplish its same purpose, the reason is the intervention, between the last annual appropriation in which it was used and the "Hyde Amendment" which was at issue in this case, of the enactment of Section 9 of P.L. 100-517 (Pet. App. "I-5," pp. 138a-139a). As explained in the Petition for Writ of Certiorari (Pet., pp. 23-26), this provision had the substantive law effect of "freezing" the regulatory structure mandating state coverage of abortions in the Medicaid program only for the medical purpose and necessity of saving the mother's life.

4. *Harris v. McRae.* Respondents read too much into *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). *Harris* only held that states were not obligated to provide, under the Medicaid program, services for which federal funding was not made available. Indeed, very compelling is the manner in which the carefully structured opinion in *Harris* painstakingly *avoids* saying what could have easily been said therein in converse to its holding—*viz.*, that states participating in the Medicaid program were required to fund abortions under Title XIX where there was federal funding available therefor. This Honorable Court deliberately left that issue open. Petitioners think that the issue was properly left open because there is a serious question as to whether Congress really intended such coverage to be mandated by the enactment of Title XIX.

5. *The HCFA Directive.* Contrary to Respondents' argument in opposition, the HCFA directive (Opp., pp. A-1 thru A-3) appears to be in direct contravention of the substantive law of Congress, both the true Congressional intent underlying the substantive provisions of Title XIX and Section 9 of P.L. 100-517 (Pet. App. "I-5," pp. 138a-139a). Against all the interpretive indicators which reveal a Congressional intent to the contrary, Respondents' argument seems to be another example of the *Petitio Principii* (Begging the Question) fallacy—*viz.*, the HCFA's own particular interpretation of the Congressional provisions is the correct one because it is the HCFA's own particular interpretation. The HCFA issued its directive without even changing its own contrary regulations—including 42 C.F.R. §§441.202 and 441.203 (Pet. App. "I-6," "I-7," p. 139a)—or holding the usually-required administrative hearings and procedures for doing so, thereby depriving states of a pre-deprivation, meaningful opportunity to be heard on the record regarding the substance of the true meaning and Congressional intent underlying Title XIX and also thereby completely

avoiding any objection for acting in contravention of Section 9 of P.L. 100-517 (Pet. App. "I-5," pp. 138a-139a). In light of the contemporaneous circumstances at the time of the enactment of the Title XIX provisions, the plain language of the Hyde Amendment as explained by the U.S. Court of Appeals for the Fifth Circuit in this case, and the explanations given by the Congressmen themselves for their amendments revealing the misinterpretations Congress must overcome to retain any part of its true intent, the validity and correctness of the HCFA directive appear to labor under a heavy burden of doubt. Under these circumstances, it is entitled to little deference, if at all, and certainly not enough to thwart a final, definitive, and reasoned judicial examination of the Congressional statutes by the Highest Court to ascertain and give effect to true Congressional intent. It is submitted that this Honorable Court owes that much to the nation, to the several states participating in the Medicaid program, to the taxpayers who pay the public funds used therein, and to the legislative institution that the Constitution has established as Congress.

Respectfully submitted,

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